86-426

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO: _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

RICHARD M. MADDOX
VICKIE ELLEN CALLAHAN
GARY DEAN GILLUM — PETITIONERS

VS.

STATE OF ALABAMA — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

DAVID CROMWELL JOHNSON
300 21st Street North
Suite 900
Birmingham, AL 35203
205/328-1414

56pp

QUESTION PRESENTED FOR REVIEW

Was the use of binoculars by police to view that which could not be seen by the unaided eye intrusive and unreasonable conduct which violated petitioner's expectations of privacy?

NO: _____

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QUESTION PRESENTED FOR REVIEW

Was the use of binoculars by police to view that which could not be seen by the unaided eye intrusive and unreasonable conduct which violated petitioners' expectations of privacy?

OPINIONS BELOW

The decision of the Supreme Court of Alabama was handed down on April 25, 1986, and the order without opinion denying the applications for rehearing before that court was delivered on June 13, 1986. Neither the opinion nor the order have been published yet; they are included in the appendix.

The decision of the Court of Criminal Appeals of Alabama was rendered on June 11, 1985, and the order without opinion denying the application for rehearing was delivered on July 23, 1985. Neither of these decisions has been published; they are included in the appendix also.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF JURISDICTION

On April 25, 1986, the Alabama Supreme Court affirmed the convictions and sentences of Vickie Callahan and Gary Gillum, and remanded Richard Maddox's cause to the Alabama Court of Criminal Appeals with directions to reconsider a state sentencing issue. Applications for rehearing filed by the State and petitioners were denied on June 13, 1986.

Callahan and Gillum invoke this Court's jurisdiction under Title 28, § 1257(3).

Maddox requests this Court to assume jurisdiction over him under the finality doctrine of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), in spite of the fact that his cause was remanded with directions to reconsider his argu-

ments that his sentencing was constitutionally disproportionate. Under Cox Broadcasting, the issue raised before this Court by Maddox has been finally determined and is ripe for review.

> There are now at least four categories of such cases in which the Court has treated the decision on the federal issue a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts ...
>
> In the first category are those cases in which there are further proceedings .. yet to occur in the state courts but where for one reason or another the federal issue is conclusive ... In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final.

Cox Broadcasting, 420 U.S. at 476-80.

STATEMENT OF THE CASE

This is a drug offense case. On June 10, 1982, Richard Maddox, Vickie Callahan and Gary Gillum were arrested at their farm home. Maddox and Gillum were indicted for trafficking in cannabis, and Callahan was indicted for possession of cannabis. Ultimately, Maddox was tried in the Circuit Court of Coosa County, Alabama and convicted as charged. Gillum and Callahan originally plead not guilty, but later withdrew that plea and entered guilty pleas with the reservation of their right to contest on appeal the legality of the search which resulted in their arrests.

The evidence presented at Maddox's trial showed that on June 9, 1982, Maddox, Callahan and Gillum were living on a farm in Coosa County, Alabama.

Officer Windsor, an investigator with the Coosa County Sheriff's Department, had information that marijuana was being grown on this farm. Based on this information, he and Coosa County Deputy Sheriff Browning proceeded to the farm. They approached on a dirt road south of the property, walked through the woods around the south end of the property and observed a "normal farmhouse scene," including a residence, shed, garage, and chicken house. The chicken house was located 15 to 20 feet from the residence and had attached to it a greenhouse. (Tr. 29-30, all references "Tr." are to the trial transcript of State of Alabama v. Richard Maddox.) Windsor and Browning were able to observe all this from behind an old barbed wire fence which encircled the property. According

to a registered land surveyor, the fence was about 400 to 425 feet away from the greenhouse. (Tr. 181)

After observing the general area and not seeing anything, Windsor and Browning walked along the edge of the woods in a westerly direction to a position due south of the greenhouse. In order to get a better view, Windsor crossed the fence and concealed himself in some bushes so he could get a better view of the greenhouse. (Tr. 32-33) With the aid of binoculars, Windsor was able to see "a couple of small plants," which he recogniz d as marijuana, growing outside the greenhouse. (Tr. 34) Windsor testified that he was unable to see any plants with the unaided eye. (Tr. 76)

Windsor then proceeded to work his

way to the corrugated fiberglass greenhouse and a pickup truck which was parked within two feet of the greenhouse. (Tr. 97) From this vantage point, he was able to see inside the greenhouse, and saw more plants he recognized as marijuana.

Windsor and Browning then left to obtain a search warrant based on Windsor's observations. The affidavit executed by Windsor said in pertinent part:

> Before me, Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this the 9th day of June, 1982, he has personally seen in plain view and within the last twenty-four hours and has probable cause to believe that there is now being cultivated marijuana plants ... upon the premises of, to wit: Gary Dean Gillum ...

In addition to the affidavit, Judge Teel was presented with Windsor's sworn

oral testimony that he had seen marijuana inside the greenhouse. The search warrant was issued by Judge Teel.

On June 10, 1982, the warrant was executed and the petitioners arrested. Law enforcement officials found a large quantity of marijuana plants growing inside the greenhouse and marijuana inside the residence.

The Alabama Court of Criminal Appeals and Supreme Court found that Windsor has encroached upon the curtilage when he moved to the pickup truck parked in front of the greenhouse. The Court of Criminal Appeals held that his conduct was a violation of petitioner's fourth amendment rights, and any information obtained as a result of his conduct could not be used to supply probable cause for the issuance of the

warrant. However, the Court of Criminal Appeals found that the issuance of the warrant was not based on this information because Officer Windsor did not include it in the four corners of his affidavit. The court further held that even if the illegally obtained information had been included, the warrant would still be valid because there was sufficient untainted evidence of the two plants to support its issuance.

The Supreme Court of Alabama agreed with the Court of Criminal Appeals and upheld the validity of the search warrant on the basis of the information about the two plants outside the greenhouse.

> Even given the illegality of Officer Windsor's intrusion into the curtilage, the warrant is valid if the underlying affidavit contains enough information independently obtained to establish probable cause. ... Officer Windsor testified that he observed, from a position outside

> the curtilage, two marijuana plants growing outside the greenhouse. This information is itself sufficient to establish probable cause.

Ex Parte Maddox, [MS 4/25/86, p. 5-6] ____ So.2d ____ (Ala. 1986).

Petitioners filed an application for rehearing and argued that the evidence about the two plants outside the greenhouse must be excluded on the basis that this information was obtained in violation of petitioners' fourth amendment right and their legitimate expectation of privacy. This is the issue now presented to this Court.

ARGUMENT FOR GRANTING THE WRIT

The basis for this petition is Supreme Court Rule 17.1(b) and (c). This case presents an issue of federal law and constitutional interpretation which has not been decided by this Court yet. Some of the federal courts of appeals have been presented with the issue, and have rendered decisions contrary to and in conflict with the decision of the Alabama Supreme Court. This Court, in the two recent aerial surveillance cases, California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210 (1986) and Dow Chemical Company v. United States, 476 U.S. ___, 90 L.Ed.2d 226 (1986), addressed this issue in dicta with different facts before it.

In this case, the testimony of Officer Windsor is clear that he moved

from beyond the fence to some point closer to, but still outside of the curtilage, in an effort to get a better view of the farm and inside the curtilage. While there, he used his binoculars to look into the curtilage and saw the two plants. He testified at the trial that without the aid of the binoculars, he was unable to discern any plants. (Tr. 76) He moved in closer and used the binoculars as an aid to see the activities of the curtilage and saw the plants in front of the greenhouse.

The evidence of the two marijuana plants should have been suppressed. The Alabama Supreme Court should not have relied on Windsor's observation of these plants to support the affirmance of the validity of the search warrant.

In United States v. Taborda, 635

F.2d 131 (2d Cir. 1980), the Second Circuit held:

> We conclude that observation of objects and activities inside a person's home by unenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy. However, any enhanced viewing of the interior of a home does impair a legitimate expectation of privacy and encounters the Fourth Amendment's warrant requirement, unless circumstances create a traditional exception to that requirement.

Taborda, 635 F.2d at 139.

In Taborda, DEA agents occupied an apartment directly across the street from the defendant's apartment. They were about to observe activities inside the defendant's apartment by peering through his uncurtained windows. On the basis of what the agents observed, a search warrant of the apartment was obtained. The affidavit in support of the warrant stated that the surveillance

had been conducted "at times by means of a highpowered telescope" set up in the DEA's apartment. The affidavit did not indicate which observations were enhanced by the use of the telescope and which were obtained through the unaided eye. The Second Circuit held that the only information which may be considered when determining whether probable cause existed for the issuance of the warrant was the information obtained without the use of the telescope, and remanded the case for a hearing to determine which observations were with the unaided eye and whether those observations alone were sufficient to provide the probable cause. The Second Circuit applied the principles of Katz v. United States, 389 U.S. 347 (1967):

> Analysis of telescopic surveillance pursuant to the Katz tests means that the fact that the area observed by the agents is the interior of a

> residence is significant, for "a man's home is, for most purposes, a place where he expects privacy." The very fact that a person is in his own home raises a reasonable inference that he intends to have privacy, and if that inference is borne out by his actions, society is prepared to respect his privacy. But the inference may be rebutted by the person's own actions. If in his home he conducts activities or places objects in such a way that the activities or objects are seen by the unenhanced viewing of persons outside the home, located where they may properly be, such observations transgress no Fourth Amendment protections because "no intention ... has been exhibited" by the householder to prevent the unenhanced viewing of others. Absent exposure to such unenhanced viewing, however, we do not believe the inference of intended privacy at home is rebutted by a failure to obstruct telescopic viewing by closing the curtains. The vice of telescopic viewing into the interior of a home is that it risks observation not only of what the householder should realize might be seen by unenhanced viewing, but also of intimate details of a person's private life, which he legitimately expects will not be observed whether by naked eye or enhanced vision. [footnotes and cites omitted.]

Taborda, 635 F.2d at 138-39.

The Second Circuit held that any

enhanced view of the defendant's apartment was an intrusion on his Fourth Amendment protections, and the information could not be used to provide the probable cause for the warrant.

The Eleventh Circuit, in United States v. Whaley, 779 F.2d 591 (11th Cir. 1985), applied the reasoning and holding of Taborda under circumstances similar to this case. Defendant Whaley set up a laboratory in his basement to manufacture illegal drugs. DEA agents conducted surveillance of the basement from the neighbor's property. They were able to see the basement activities though a window. Although all activities could be seen with the naked eye, the agents frequently used binoculars to aid their observations. The information obtained from the surveillance was

relied upon to show probable cause for the issuance of a search warrant of the basement. Whaley argued that the warrant was invalid because the visual observations had violated his Fourth Amendment rights. The Eleventh Circuit held that the unaided observations did not intrude upon his rights because "given the duration of the activity in [his] basement and the increased chance of discovery caused by the activities of [his co-conspirator] prior to the DEA's surveillance," he had no reasonable expectation of privacy.

Whaley next argued that the enhanced observations tainted the issuance of the warrant.

> The use of vision enhancing devices can taint an otherwise valid surveillance of the interior of a home when the devices allow the observer to view not only activities the homeowner should realize might be seen by unenhanced viewing but also the details of activities the

> homeowner legitimately expects will not be observed. In the surveillance in this case, however, the agents did not need binoculars to view the illicit conduct in appellant's basement. During the evidentiary hearing on appellant's motion to suppress, the magistrate heard testimony from the agents concerning their observations. The agents described which activities they could have observed without binoculars and which activities or objects could be seen only with the binoculars. In his report and recommendation to the district court, the magistrate found that, although the agents regularly used binoculars during the surveillance, the majority of the conduct described in the affidavit could have been viewed without visual aid ... The magistrate concluded, therefore, that ample probable cause existed to issue the search warrant even if the binocular assisted observations described in the affidavit were not considered.

Whaley, 779 F.2d at 591.

The Eleventh Circuit held that the inclusion of the enhanced observations in the affidavit was harmless because the agents could have viewed the activities with the naked eye, and these

observations were few in comparison to the amount of information obtained through the naked eye.

In United States v. Lace, 669 F.2d 46 (2d Cir. 1982), the circuit court noted that use of visual aids to examine places protected from public view is a violation of the Fourth Amendment. Lace, 669 F.2d at 51. However, in that case, it found that although binoculars and a spotting scope were used to observe activities in the curtilage, there was no reasonable expectation of privacy. "[B]ecause the area between the house, the garage, and the barn was clearly visible from the road and could easily be observed by outsiders who "could enter the open property at will", there was no reasonable expectation of privacy. Lace, 669 F.2d at 50. In the

case at bar, the curtilage could not be seen from the road. The property was fenced off and at various points had "No Trespassing" signs posted. (Tr. 184-86) There was also a second fence with a gate located near the house itself. (Tr. 82-83) Petitioners could reasonably have held an expectation of privacy in the activities and small objects within the curtilage. The curtilage is entitled to the same degree of Fourth Amendment protection as the home. It is the "area to which extends the intimate activity associated with the "sanctity of a man's home" and the privacies of life." Oliver v. United States, 104 S. Ct. 1735, 1743 (1984). It is a reasonable expectation that the "area immediately adjacent to the home will remain private." Oliver, 104 S. Ct. at 1743.

The fact that some of petitioners open air activities where seen does not render their expectation of privacy unreasonable. "The constitution does not require that in all cases a person, in order to protect his privacy, must shut himself off from fresh air, sunlight and scenery." State v. Ward, 617 P.2d 568, 573 (Haw. 1980). Petitioners had expressed and manifested an intent and belief that the activity of the curtilage be protected from public view.

In United States v. Allen, 675 F.2d 1373 (9th Cir. 1980), the Ninth Circuit distinguished its case from cases like Taborda on the basis that defendants had no reasonable expectation of privacy in their activities which occurred on their ranch. In that case, a Coast Guard

helicopter, with agents using special camera lenses, observed tire tracks leading to and from a barn and a new extension built on the barn. They also observed a tractor trailer rig and a van on the property. The Ninth Circuit held that defendants did not have a reasonable expectation of privacy because there were frequent Coast Guard helicopter flights over the property prior to this surveillance. "As such, the residents could not reasonably bear a subjective expectation of privacy from the Coast Guard's airborne scrutiny of the objects observed here, large schale modifications of the Allen Ranch landscape and barn." Allen, 675 F.2d at 1381.

The fact presented in the case at bar are substantially different from

those presented in Allen. This case is not one where defendants are claiming a reasonable expectation of privacy in massive objects located on their property. They claim only that the activity and small objects located within the curtilage were protected from the public view. They were not visible from any public road. Windsor testified that he could not see them, and it was not until he had crossed the fence and stopped about halfway to the greenhouse that he was even able to see the plants, and then, only with the aid of binoculars.

The Supreme Court of Hawaii has considered a trio of cases regarding surveillance of private property with the use of visual aids, which conflicts with the decision of the Alabama Supreme

Court. The court held that telescopic surveillance which allows police to see what they could not see with the unaided eye is illegal.

> We find that the police officer's use of the binoculars as an optic aid was unreasonable and intruded upon appellants' reasonable expectation of privacy. Noone can doubt that telescopic aids are useful investigative tools in the hands of law enforcement officers. Sophisticated optical aids permit the police to peer into secret places from great distances without a suspect knowing that his movement is being watched. But, if the purpose of the telescopic aid is to view that which could not been seen without it, it is a constitutional invasion. (emphasis added)

State v. Ward, 617 P.2d 568, 573 (1980); State v. Dias, 52 Haw. 100, 470 P.2d 510 (1970)(telescopic surveillance of passageway between two apartments on private property struck down even though activities observed were occurring outside, where defendants were on private land

and had reasonable expectation of privacy). Cf. State v. Hobron, 648 P.2d 194, 197 (1982)(no invasion of privacy where binoculars used to "confirm unaided observations into an area where appellant ha[d] no reasonable expectation of privacy.").

In two recent cases before this Court, the issue was brought up, but the Court declined to rule on it because the facts of each case did not require the ruling. In Dow Chemical Company v. United States, 476 U.S. ____, 90 L.Ed.2d 226 (1986), the Court was asked whether the EPA's aerial photography and surveillance of Dow's industrial complex violated the Fourth Amendment. Evidence was presented that photographs of the facility were taken from an aircraft within the navigable airspace, with the use of a precision aerial mapping camera. The Court held that there was

no Fourth Amendment violation. Almost as an afterthought, the Court stated:

> It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, might be constitutionally prescribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.

Dow Chemical, 476 U.S. at ____, 90 L.Ed.2d at 237-38.

In a footnote, the Court explained that it could not rule whether enhanced observation would be an intrusion because "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations." Dow Chemical, 476 U.S. at ____, 90 L.Ed.2d at 238 n. 5.

In California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210 (1986), another aerial surveillance case decided by this Court on the same day as Dow Chemical, the Court clearly held that naked eye observations of the curtilage from navigable airspace do not intrude upon reasonable expectations of privacy, but again declined to decide the question of whether enhanced views of the curtilage would violate the Fourth Amendment. In a footnote, the Court noted that although it was not in issue, "[t]he State acknowledges that 'aerial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens'. " Ciraolo, 476 U.S. at ___, 90 L.Ed.2d at 218 n. 3.

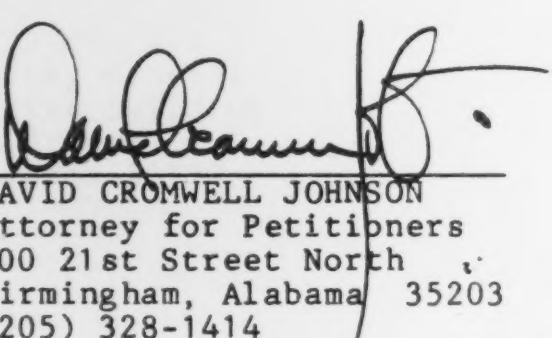
CONCLUSION

The Alabama Supreme Court refused to exclude the information about the two plants which was obtained only as a result of surveillance aided by binoculars. Instead, it considered this to be sufficient information to support the issuance of the search warrant. Without this information, there would be no probable cause to search. This decision is in conflict with the decisions of other jurisdictions which have considered the issue.

If the decision of the Alabama Supreme Court is allowed to stand, then citizens have absolutely no protection from intrusive searches. The combination of the open fields doctrine and this recent decision means that persons living in Alabama and conducting their

business here can have no reasonable expectation of privacy in their outdoor activities, even if those activities occur within the curtilage or backyard of their home. The only activities which would be protected are those which occur inside behind closed windors and doors.

Wherefore, the above premises considered, petitioners respectfully request this Honorable Court to grant the writ of certiorari to the Alabama Supreme Court and take the issue under consideration.



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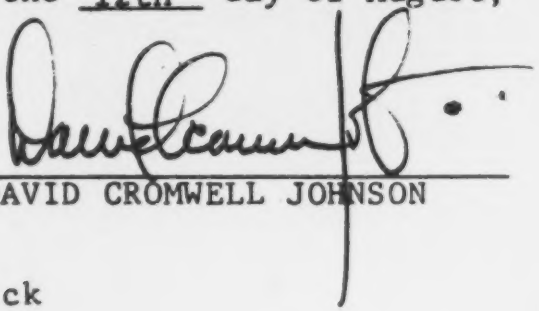
CERTIFICATE OF SERVICE

I do certify that I have mailed a copy of the foregoing on all counsel of record by placing same in the United States mail, first class postage pre-paid, on this the 12th day of August, 1986.



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A P P E N D I X

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

5 Div. 761
5 Div. 919
5 Div. 920

Richard M. Maddox
Vickie Ellen Callahan
Gary Dean Gillum

v.

State

Appeals from Coosa Circuit Court

Decided June 12, 1985
Rehearing denied July 23, 1985

PATTERSON, JUDGE.

The appellants, Richard M. Maddox, Vickie Ellen Callahan, and Gary Dean Gillum, were arrested on June 10, 1982, and charged with violating the Alabama

Uniform Controlled Substances Act. Ala. Code 1975, § 20-2-1 through 20-2-144. Appellants Maddox and Gillum were specifically charged with trafficking in cannabis, in violation of § 20-2-80, and appellant Callahan was specifically charged with possession of marijuana, in violation of § 20-2-70. Indictments were returned against each appellant, by the June 1982 term of the Coosa County Grand Jury, indicting each with the violation for which they were initially charged.

On December 2, 1982, Maddox was found guilty of trafficking in cannabis by a Coosa County jury. Following an unfavorable pre-sentence report, Maddox was sentenced to a term of fifteen years in the penitentiary. On November 28, 1983, eleven months after Maddox was

found guilty, Callahan pleaded guilty to felony possession of marijuana and was sentenced to three years' imprisonment. On the same day, Gillum pleaded guilty to trafficking in cannabis, and was sentenced to four years' imprisonment. In a supplemental plea agreement, the State, with apparent approval of the trial court, agreed that Callahan and Gillum retained the right to appeal the legality of the search which led to the obtaining of evidence against the appellants.

Subsequent to this agreement, Callahan and Gillum moved to consolidate their appeals with that of Maddox. A similar motion was made by the State. All appellants are represented by the same attorney on appeal. The motions to consolidate were granted by this court

on November 7, 1984.

On his appeal, Maddox questions the legality of the search and seizure of evidence which led to his conviction. At trial his motion to suppress, after a hearing thereon, was overruled by the trial court. In a supplemental brief filed on behalf of Callahan and Gillum, they raise the same issues presented for review by Maddox. Resolution of the issues raised by Maddox will be dispositive of the issues raised by Callahan and Gillum.

On June 9, 1982, Officer David Windsor, an investigator with the Coosa County Sheriff's Department, received information that marijuana was being grown on premises subsequently determined to be occupied by Maddox, Callahan, and Gillum. Based upon this

information, Windsor and Coosa County Deputy Sheriff Terry Browning proceeded to the property. Windsor and Browning approached from a dirt road south of the property and observed what Windsor described as a "normal farmhouse scene."

Windsor testified that he observed a dwelling house, shed, garage, and chicken house, all grouped in the same general area. The chicken house was located 15 to 20 feet from the dwelling. Attached to the east side of the chicken house was a greenhouse-type structure "covered with corrugated fiberglass." Windsor and Browning observed this scene from a wooded area south of the buildings and beyond an "old fence," which encircled the property. This fence was described as "old," but not decayed. Windsor

testified that the fence was approximately 200 to 300 feet south of the buildings. J. M. Keel, a land surveyor, testified that the fence was 400 to 425 feet from the greenhouse.

After observing the general area, the deputies then walked along the "edge of the woods" in a westerly direction, to a position due south of the greenhouse. In order to get a better view, Windsor then crossed the fence and concealed himself in some bushes along the edge of a pond which was on the property. From this position, Windsor studied the scene with the aid of a pair of binoculars. Windsor testified that with the aid of the binoculars he observed "a couple of small plants," which he recognized as marijuana, growing outside the greenhouse doors.

Windsor then moved closer to the greenhouse and hid behind a pickup truck parked in front of the greenhouse. Windsor observed two more marijuana plants growing outside the greenhouse. The greenhouse had two large doors with large slits hung at the opening. Windsor could see into the greenhouse and observed more marijuana plants. The deputies then left and obtained a search warrant based on Windsor's observations.

On June 10, 1982, Windsor and five other law enforcement personnel returned to the property to execute the search warrant. The warrant was directed to Gillum as owner of the property. His ownership was indicated by the county tax assessor's records. Maddox, Callahan, and Gillum were found in the greenhouse. Windsor testified that,

upon being arrested, Maddox stated, "I don't guess that was such a good idea after all." During a search of the residence, marijuana was found in almost every room. The appellants accompanied the officers during the search, and Windsor testified that Maddox identified one of the bedrooms as being his. The two other bedrooms were identified as belonging to Callahan and Gillum. Maddox also claimed ownership of some "cash money" which was in the room identified as his. In reference to the money, Maddox purportedly stated to Windsor. "I have just gotten my check cashed. That doesn't have anything to do with this." Maddox did not take the stand in his own behalf either on the motion to suppress or at trial. He offered no evidence at trial and his

defense consisted of a probing and searching cross-examination of the State's witnesses and arguments to the jury.

On appeal the appellants contend that the search warrant was improperly issued and therefore that no evidence resulting from the search would be admissible against them. Appellants do not question the facial sufficiency of the affidavit nor do they dispute the evidence presented to the magistrate to support a finding of probable cause for the issuance of the search warrant. Rather they contend that all the evidence before the magistrate was obtained by the officer in violation of their Fourth Amendment rights, and, therefore, that it was improper for the magistrate to consider it in making a

determination of probable cause. The State's sole argument is that Maddox did not have standing to contest the search; it neither addresses the validity of the search nor the issues as raised by Callahan and Gillum.

I

In contending that the evidence seized pursuant to the search warrant should have been suppressed, it is argued that Windsor's actions in gaining his information for the magistrate's probable cause determination constituted a search; that this warrantless search could not be justified as falling within the "open fields" or "plain view" doctrines; and that, therefore, the evidence obtained should not have been used to secure the warrant. In effect, the appellants contend that the two

doctrines do not operate to allow Officer Windsor's observations to be utilized as probable cause to support the issuance of the search warrant. We agree that the cited doctrines are inapplicable to the facts of this case; however, we view the inapplicability of these doctrines as having no effect on the issuance of the warrant.

Our analysis will first focus on Officer Windsor's initial observations from his position near or at the pond. We will then discuss the ramifications of Officer Windsor's second position closer to the greenhouse. As will be seen, Officer Windsor did not violate any of the appellants' Fourth Amendment rights until he crossed the constitutionally protected threshold of the curtilage in order to obtain a

better view of the plants he had previously identified as marijuana.

A.

When Officer Windsor positioned himself near the pond and spotted the two marijuana plants growing outside the greenhouse, he was not in a factual situation in which the "plain view" doctrine would have been applicable. This doctrine allows government agents to make warrantless seizures under certain well defined circumstances. See Myers v. State, 431 So. 2d 1342 (Ala. Cr. App. 1982), cert. quashed, 431 So. 2d 1346 (Ala. 1983). See also Moylan, The Plain View Doctrine, 26 Mercer L. Rev. 1047 (1975); W. LaFave, Search and Seizure, § 2.2 (1978). We view the facts of the case at bar as a situation more appropriately designated as an

"open view" in which Fourth Amendment protections do not operate. See Texas v. Brown, 460 U.S. 730 (1983); Scales v. State, 13 Md. App. 474, 284 A.2d 45 (1971).

Appellant secondly contends that the "open fields" doctrine does not apply. The "open fields" doctrine allows government agents to make warrantless seizures of property in open field areas. "The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects', is not extended to open fields." Hester v. United States, 265 U.S. 57, 59 (1924). Appellant does not argue that the pond was within the curtilage of the home, and the tendency of the evidence would not support such a finding given, its great distance from

the residence. As stated by Judge Moylan, The Fourth Amendment Inapplicable, 1 S. Ill. U.L.J. 75, 83 (1977), "The clear teaching of Hester is rather that in open fields, the Fourth Amendment is inapplicable and that noncompliance with its dictates is therefore, immaterial." The clear pronouncement of Hester was recently reaffirmed by the United States Supreme Court in Oliver v. United States, ____ U.S. ____, 104 S. Ct. 1735, 1741 (1984), where the Court stated that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Furthermore, it is made clear by the teaching of Oliver, ____ U.S. at ____, 104 S. Ct. at 1744, that the fact that

Officer Windsor was trespassing when he observed the two marijuana plants, has "little or no relevance to the applicability of the Fourth Amendment." See also, Whistenant v. State, 50 Ala. App. 182, 278 So. 2d 183, cert. denied, 291 Ala. 802, 278 So. 2d 198, cert. denied, 414 U.S. 1066 (1973). It is clear that Officer Windsor could legitimately search the open fields surrounding the property without violating any Fourth Amendment rights, because "[t]he Fourth Amendment is simply not 'out there' in the open fields." Moylan, The Fourth Amendment Inapplicable, at 92. See also Skipper v. State, 387 So. 2d 261 (Ala. Cr. App.), cert. denied, 387 So. 2d 268 (Ala. 1980).

B.

The testimony of Officer Windsor established that the residence, garage, shed, chicken house, and greenhouse were all in relatively close proximity to each other. Officer Windsor described it as a "normal farmhouse scene" situated on approximately forty acres of land, enclosed by barbed wire fencing. Mr. C. M. Keel testified that he observed the presence of several "no trespassing" signs around the boundary when he surveyed the property. Officer Windsor denied seeing any signs. When Officer Windsor approached the greenhouse, he had to calculate his position in order not to be seen by persons occupying the residence, which was located 15 to 20 feet from the chicken house which had the greenhouse appended to it. This chicken house was

located south of the residence, and another, smaller building was situated on the north side of the residence. The front door of the residence faced east. The pond was located south of the chicken house/greenhouse, and Windsor positioned himself on the east end of the pond. Officer Windsor was therefore observing the front of the residence and chicken house/greenhouse. A truck, which Officer Windsor hid behind when he approached for a closer observation, was parked in front of the chicken house/greenhouse.

In Whistenant v. State, 50 Ala. App. at 194, 278 So. 2d at 194, the court stated:

> "The Fourth Amendment does, however, apply to buildings within the curtilage which may include 'a garage ...; a barn ...; a

> smokehouse ...; a chicken house ...; and similar property. Whether the place to be searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.' Care v. United States (10 Cir.) 231 F.2d 22."

See also Skipper v. State, supra. The evidence adduced at trial clearly established that the chicken house/greenhouse was within the curtilage of the residence. No Fourth Amendment violation occurred until Officer Windsor made this warrantless entry into a constitutionally protected area. As stated by Judge Moylan:

> "When the policeman stands outside the constitutionally protected area and looks inside, his constitutionally legitimate observations simply give him probable cause. Some additional predicate is necessary for him

then to cross the threshold.

> "In the case of fixed premises, all the probable cause in the word will not justify a warrantless entry. Coolidge [v. New Hampshire, 403 U.S. 443 (1971),] was very clear on that point...."

Moylan, The Plain View Doctrine, 26 Mercer L. Rev., at 1098.

II

Having determined that Officer Windsor encroached upon the curtilage without a warrant in violation of the Fourth Amendment protection against unreasonable searches, we must now determine whether this violation invalidated the warrant and, consequently, whether the evidence seized should have been suppressed.

In the case sub judice, the warrant affidavit states in pertinent part:

> "Before me, Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this, the 9th day of June, 1982, he has personally seen in plain view and within the last twenty-four hours and has probable cause to believe and does believe that there is now being cultivated marijuana plants ... upon the premises of, to-wit: Gary Dean Gillum...."

This affidavit was typed by Windsor and taken to judge Teel, who issued the search warrant. Windsor swore, under oath, to the truth and correctness of the affidavit and discussed additional facts with the Judge which were not detailed in the affidavit.

During the suppression hearing, defense counsel extensively cross-examined Windsor about his testimony before Judge Teel. The pertinent part of the record reflecting this cross-examination is as follows:

"Q. ... All right. With the information that you then had you came down, Mr. Windsor, and talked with Judge Teel?

"A. On the 9th.

"Q. On the 9th, and swore to the pertinent aspects for the purpose of getting a search warrant?

"A. Yes, sir.

"Q. And everything that you told him is within the four corners of this warrant here?

"A. No, sir, not everything.

"Q. Well, the pertinent materials are within the four corners of this warrant?

"A. There was other information mentioned.

"Q. What other information did you give him?

"A. That there was a greenhouse and there was marijuana growing in it.

"Q. Is that all?

"A. I don't remember everything that was said but there were other things.

"Q. Whatever you recall, I would

like for you to tell us what you recall.

"A. I told him to the effect that there was a large greenhouse up there on the side of the chicken house and that there was marijuana growing in it.

"Q. All right. Anything else?

"A. Not that I recall.

"Q. All right. So what you told him is those things you have just mentioned -- and of course you said in here that you had seen it?

"A. Yes, sir.

"Q. All right. And what you have told him, that was typed up and that you swore to?

"A. Yes, sir.

"Q. For the purpose of getting a search warrant?

"A. Yes, sir, that's right.

"....

"Q. You came back -- called somebody, I know that, but eventually came back to the courthouse and saw Judge Teel and told him that you had seen plants on the property of Gillum -- whatever Gillum's last name is, is

that right?

"A. Told Judge Teel that?

"Q. Yes, sir.

"A. Yes, sir.

"Q. You didn't tell him you had already been on that man's property, did you?

"A. I told him I had seen the plants.

"Q. All right. But you didn't tell him you had seen them from an opening on the property up next to the property?

"A. I don't know whether I told him that or not.

"....

"Q. Then you typed it up and went out to Judge Teel's house. What time of night, please, sir?

"A. I arrived at his house sometime shortly before twelve midnight that night. After we talked for a while, when he was ready to sign it.

"....

"Q. But, at any rate, you wanted to search a garage, two chicken houses, and any and all

outbuildings of this same residence? That's what you wanted to search, what you told the judge you wanted to search?

"A. Yes, that's what I wanted to search.

"Q. And that was what was these things right here, isn't that true? (Indicating)

"A. Yes, sir."

"Q. Is that what you wanted to search?

"A. Yes, sir.

"Q. And at the time you told the judge that, you had already been up there and seen in the slits, had you not?

"A. Yes, sir.

"Q. And you had seen those plants right there inside the fenced part but before you get to that flapping area? You had seen those plants in there, hadn't you?

"A. Yes, sir.

Our review of the affidavit and testimony leads us to conclude that the search warrant was not invalidated by

the illegally obtained information, for it is clear that the tainted information was not included in the warrant affidavit. There is no specific reference in the affidavit to the observations of marijuana growing in the greenhouse, although this information was communicated to Judge Teel outside the affidavit. The affidavit states that Windsor saw "in plain view" marijuana being cultivated on the property. Obviously Windsor's non-technical use of the term "plain view" is synonymous with the term "open view." The only plants which could be said to be in "open view" were the two initially observed by Windsor from the pond. We believe that the facts alleged in the affidavit refer to the officer's untainted observations of the marijuana

plants growing outside the greenhouse. This is supported by his testimony quoted above, where he, if effect, states that the information given the magistrate concerning the marijuana plants in the greenhouse was not included in the "four corners" of the affidavit. Even if the tainted evidence had been included in the affidavit, it would not have necessarily rendered the resulting warrant invalid. United States v. Giordano, 416 U.S. 505 (1974); United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977). In the recent case of United States v. Karo, ____ U.S. ____, 104 S. Ct. 3296, 3303 (1984), a case involving electronic surveillance, the Court determined that monitoring the beeper in a private residence not open

to visual surveillance, violated the petitioner's Fourth Amendment rights. The Court then stated:

> "... That information, which was included in the warrant affidavit, would also invalidate the warrant for the search of the house if it proved to be critical to establishing probable cause for the issuance of the warrant. However, if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid."

Id., ____ U.S. at ____, 104 S. Ct. at 3305. See also Neary v. State, 384 So. 2d 881 (Fla. 1980).

Thus, assuming arguendo that the affidavit's averments can be interpreted to include information gained from the tainted observations, the search warrant is not invalidated because this illegal information was not critical to establishing probable cause. The affidavit obviously includes the

untainted evidence of Windsor's initial observations of the two marijuana plants. This information was sufficient to establish probable cause. More than a mere suspicion of illegal activity resulted from an observation of two marijuana plants growing outside what appeared to be a greenhouse. The information obtained by Windsor's closer observation was merely cumulative of the information he had already obtained. As stated in United States v. Epstein, 240 F. Supp. 80, 83 (S.D.N.Y. 1965):

> "This is not to say that law enforcement officials may with impunity include impermissible matter in applications for search warrants in the hope that a Commissioner might thereby be persuaded to find probable cause where otherwise none exists or the issue is in doubt .... But in a case like the present one, where the challenged matter is merely cumulative, no such danger is run and the warrant may be upheld."

See also United States v. Sterling, 369 F.2d 799 (3d Cir. 1966) (quoting Epstein with approval).

Where a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner, and should resolve doubtful or marginal cases according to the preference to be accorded to warrants. United States v. Ventresca, 380 U.S. 102 (1965); 68 Am. Jur. 2d Searches and Seizures § 64 (1973). Great deference should be given to a magistrate's determinations. Illinois v. Gates, 462 U.S. 213 (1983); Houk v. State, 455 So. 2d 115 (Ala. Cr. App. 1984), cert. denied, 455 So. 2d 115 (Ala. 1984); Waters v. State, 357 So. 2d 368 (Ala. Cr. App.), cert. denied, 357

So. 2d 373 (Ala. 1978).

It is our judgment that the affidavit supporting the search warrant met the constitutional requisites, and the resulting search of the property was permissible. We hold that the trial court did not err when it overruled appellant Maddox's motion to suppress. The evidence seized was properly admitted into evidence at appellant Maddox's trial. It would not have been proper to suppress the evidence seized with respect to any of the appellants.

III

Having found that the search was made pursuant to a valid warrant, we find it unnecessary to address Maddox's contention that the statements he made during the search should have been suppressed as being the fruit of an

unlawful search and seizure.

IV

As we have pointed out, the sole contention of the State is that Maddox did not have standing to object to the search and seizure. In view of our findings above, we deem it unnecessary to address the questions of standing raised by the State on appeal.

We have considered appellant Maddox's contention that the trial court abused its discretion in sentencing him to fifteen years while sentencing Callahan and Gillum to three and four years, respectively. We find no merit in this contention.

For the reasons stated above, the judgment of the trial court in reference to Maddox is due to be, and it is hereby, affirmed.

We have examined the statement of additional facts set out in the supplemental brief filed on behalf of Callahan and Gillum and find no support for a different result from that which we have reached in the case of appellant Maddox. Accordingly, the judgments of the trial court in reference to appellants Callahan and Gillum are likewise due to be, and they are hereby, affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

THE STATE OF ALABAMA -- JUDICIAL

DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1985-86

Ex parte Richard M. Maddox,
Vickie Ellen Callahan, and
Gary Dean Gillum

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Richard M. Maddox,
Vickie Ellen Callahan, and
Gary Dean Gillum

84-1159 v.

State)

Decided April 25, 1986
Rehearing denied June 13, 1986

BEATTY, JUSTICE.

The Court granted certiorari in this case in order to determine whether the evidence seized pursuant to a search of a farm where Richard Maddox, Vickie Callahan,and Gary Gillum resided should

be suppressed because law enforcement officials allegedly violated their Fourth Amendment rights, and to determine whether Maddox's subsequent sentence violated his Eighth Amendment rights. We affirm in part, and remand with directions.

On December 2, 1982, Maddox was found guilty of trafficking in cannabis by a Coosa County jury and sentenced to a term of 15 years in the penitentiary. On November 18, 1983, Callahan pleaded guilty to felony possession of marijuana and was sentenced to three years' imprisonment. On the same day, Gillum pleaded guilty to trafficking in cannabis and was sentenced to four years' imprisonment. In a supplemental

plea agreement, the State, with apparent concurrence of the trial court, agreed that Callahan and Gillum retained the right to appeal the legality of the search which led to the obtaining of evidence against the petitioners. The appeals of the three petitioners were consolidated by the Court of Criminal Appeals.

On June 9, 1982, Officer David Windsor, an investigator with the Coosa County Sheriff's Department, received information that marijuana was being grown on premises subsequently determined to be occupied by Maddox, Callahan, and Gillum. Based upon this information, Officer Windsor and Coosa County Deputy Sheriff Terry Browning proceeded to the property.

Officers Windsor and Browning approached the property from a dirt road south of the property and observed what Officer Windsor described as "normal farmhouse scene." Officer Windsor testified that he observed a dwelling house, shed, garage, and chicken house, all grouped in the same general area. The chicken house was located 15 to 20 feet from the dwelling. Attached to the east side of the chicken house was a greenhouse-type structure "covered with corrugated fiberglass." The two officers observed this scene from a wooded area south of the buildings and beyond an "old fence" which encircled the property. Officer Windsor testified that the fence was approximately 200 to 300 feet south of the buildings;

however, J. M. Keel, a land surveyor, testified that the fence was 400 to 425 feet from the greenhouse.

After observing the general area, Officers Windsor and Browning then walked along the "edge of the woods" in a westerly direction to a position due south of the greenhouse. In order to get a better view, Officer Windsor then crossed the fence and concealed himself in some bushes along the edge of a pond which was on the property. With the aid of binoculars, Officer Windsor observed a "couple of small plants," which he recognized as marijuana, growing outside the greenhouse doors.

Officer Windsor then moved closer and hid behind a pickup truck parked in front of the greenhouse. He observed

two more marijuana plants growing outside the greenhouse. The greenhouse had two large doors, which were open; however, a plastic partition with large slits hung at the opening. Officer Windsor could see into the greenhouse and observed more marijuana plants. The two officers then left and obtained a search warrant based on Officer Windsor's observations.

On June 10, 1982, Officer Windsor and five other law enforcement personnel returned to the property to execute the search warrant. The warrant was directed to Gillum as owner of the property. His ownership was indicated by the county tax assessor's records. Maddox, Callahan, and Gillum were found

in the greenhouse.

During a search of the dwelling house, marijuana was found in several rooms, including the three bedrooms. The appellants accompanied the officers during the search, and Officer Windsor testified that Maddox identified one of the bedrooms as being his. The two other bedrooms were identified as belonging to Callahan and Gillum. Maddox also claimed ownership of some "cash money" which was found in the room identified as his.

The petitioners contend that Officer Windsor's intrusion into the curtilage of their residence was a violation of their Fourth Amendment rights, and, therefore, that the search

should be suppressed.

The Court of Criminal Appeals determined that Officer Windsor intruded upon the curtilage of the residence of the petitioners without a warrant in violation of the Fourth Amendment protection against unreasonable searches. However, that court held that the search warrant itself was not invalidated by the fact that the information was illegally obtained, because the tainted information was not included in the warrant affidavit.

The Fourth Amendment to the United States Constitution and Article I, § 5, of the Alabama Constitution protect people from unreasonable searches and seizures of their persons, houses,

papers, and possessions. This protection applies to the area immediately surrounding one's home, often referred to as the curtilage. Oliver v. United States, 466 U.S. 170 (1984); Whistenant v. State, 50 Ala. App. 182, 278 So. 2d 183, cert. denied, 291 Ala. 802, 278 So. 2d 198, cert. denied, 414 U.S. 1066 (1973).

Officer Windsor could legitimately search the open fields surrounding the petitioners' property without violating any Fourth Amendment rights. Moylan, The Plain View Doctrine, 26 Mercer L. Rev. 1047, 1097 (1975); Skipper v. State, 387 So. 2d 261 (Ala. Crim. App.), cert. denied, 387 So. 2d 268 (Ala. 1980). When Officer Windsor positioned

himself near the pond and spotted two marijuana plants growing outside the greenhouse, he was not violating Fourth Amendment rights, as he was not within the curtilage.

The Fourth Amendment protection applies to buildings within the curtilage. Whistenant v. State, supra. The evidence adduced at trial established that the greenhouse was within the curtilage. We agree with the Court of Criminal Appeals that when Officer Windsor entered the curtilage without a warrant he was violating the petitioners' Fourth Amendment rights. We must now determine whether this violation invalidated the search

warrant.

The warrant affidavit states in pertinent part:

> "Before me Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this the 9th day of June, 1982, he has personally see in plain view and within the last twenty-four hours and has probable cause to believe and does believe that there is now being cultivated marijuana plants ... upon the premises of, to-wit: Gary Dean Gillum...."

"The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contains allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit

suffices to show probable cause." United States v. Gardenia, 416 U.S. 505, 555 (1974) (Powell, J., concurring in part and dissenting in part). This rule has been upheld by a number of federal courts of appeals. See, e.g., United States v. Romero, 585 F.2d 391 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979); United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977); United States v. Watts, 176 U.S. App. D.C. 314, 540 F.2d 1093 (D.C. Cir. 1976).

Even given the illegality of Officer Windsor's intrusion into the curtilage, the warrant is valid if the underlying affidavit contains enough information independently obtained to

establish probable cause. See United States v. Adames, 485 F. Supp. 965 (E.D. N.Y. 1980), affirmed, 652 F.2d 55 (2d Cir. 1981).

Applying the above rule to the underlying affidavit in this case, we find that the affidavit contains sufficient information, independent of information related to the search within the curtilage, to enable the magistrate to find probable cause. Officer Windsor testified that he observed, from a position outside the curtilage, two marijuana plants growing outside the greenhouse. This information in itself was sufficient to establish probable cause.

Bearing in mind the limited

standard of proof necessary for a showing of probable cause, we affirm the judgment of the Court of Criminal Appeals insofar as it held that the search warrant was not invalidated by the illegally obtained information and thus that the evidence seized was properly admitted into evidence at trial.

Maddox also contends in this Court, as he did below, that the trial court abused its discretion in sentencing him to fifteen years' imprisonment, while sentencing Callahan and Gillum to three and four years' imprisonment, respectively.

The appellate courts of this state are generally prohibited from reviewing

the propriety of a sentence which is within the statutorily prescribed limits, as is Maddox's sentence. Brown v. State, 392 So. 2d 1248 (Ala. Crim. App. 1980), cert. denied, 392 So. 2d 1266 (Ala. 1981); Code of 1975, § 20-2-80. However, the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense charged that it constitutes a violation of a defendant's Eighth Amendment rights. Ex parte Harbor, 465 So. 2d 460, 461 (Ala. 1985) (Faulkner, J., dissenting).

The United States Supreme Court in Solem v. Helm, 463 U.S. 277 (1983), recognized that reviewing courts should grant substantial deference to the

authority of legislatures in determining the kinds and limits of punishment for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Yet, the sentence should be proportionate to the crime. In making a proportionality determination, a court should be guided by objective criteria, including:

> "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. at 290-91.

Maddox received the maximum sentence allowed by law for his first felony conviction, while Gillum and

Callahan received a four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment. Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that court with directions to consider this case in light of Solem v. Helm, supra. It is so ordered.

AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.

Torbert, C.J., Maddox, Jones, Almon, Shores, Adams, and Houston, J.J., concur.